

PHAM (Migration) [2019] AATA 3680 (2 August 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Ms Phuong Phuong Tran Pham
VISA APPLICANT:	Mr Ngoc Tuan Tu Tran
CASE NUMBER:	1620348
DIBP REFERENCE(S):	OSF2016/039078
MEMBER:	Scott Clarey
DATE:	2 August 2019
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211(2) of Schedule 2 to the Regulations; • cl.309.221 of Schedule 2 to the Regulations; • r.2.03A.

Statement made on 02 August 2019 at 2:07pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine de facto relationship – living in separate countries – previously lived together – relationship history – timeline of significant events – plans for the future – familiarity with each other – credible witnesses – 12 month requirement – decision under review remitted 1.

LEGISLATION

*Migration Act 1958 (Cth), ss 5CB, 65
Migration Regulations 1994 (Cth), rr 1.09A, 2.03A; Schedule 2, cls 309.211, 309.221*

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 22 November 2016 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
3. The visa applicant applied for the visa on 15 March 2016 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2) and cl.309.221 because the delegate was not satisfied that the visa applicant is the spouse or de facto partner of the sponsor.
5. The review applicant (Ms Phuong Phuong Tran Pham, herein Ms Pham) appeared before the Tribunal on 30 July 2019 to give evidence and present arguments. The Tribunal also received oral evidence (via phone) from the visa applicant (Mr Ngoc Tuan Tu Tran, herein Mr Tran), Ms Pham's sister (Ms Phi Phi Tran Pham) and a friend of Mr Tran's (Mr Duy Hai Dang).
6. The review applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

8. Background

9. Mr Tran is a 32-year-old Vietnamese national who currently lives in Ho Chi Minh City, his hometown. He previously resided in Australia from 2009–2016, having first arrived on a student visa. On 17 July 2015 an application for a Partner (Temporary) (Class UK) Subclass 820 visa was lodged. This application was refused by the Department on 11 February 2016 on the basis that Mr Tran did not satisfy cl.820.211(2)(d) because he was not the holder of a substantive visa at the time of application and he did not satisfy the Schedule 3 criteria. The delegate found there were no compelling reasons to waive the Schedule 3 requirements. The Tribunal accepts that Mr Tran has never been previously married and does not have any children to previous relationships.
10. Ms Pham is a 29-year-old Australian citizen who was born in Vietnam. The Tribunal accepts that Ms Pham was previously married in July 2010 and this marriage ended in divorce in April 2015. The Tribunal accepts that she does not have any children from previous relationships.
11. The parties claim to have met in 2013 when Mr Tran began working at a restaurant owned by Ms Pham's then husband. Ms Pham claims her relationship with her then husband was strained at this point and broke down irreparably in or around July 2013, when she claimed to have separated from her ex-husband. Ms Pham's friendship with Mr Tran developed in the latter half of 2013 and the two became romantically involved. Mr Tran proposed marriage to Ms Pham in February 2014 after she returned from a trip to Vietnam for her father's funeral.

The Tribunal accepts that the parties moved in together shortly afterwards to a property in Maidstone and continued to live together, including at addresses in Richmond and Bundoora, until Mr Tran departed Australia in March 2016.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue in the present case is whether the visa applicant is the de facto partner or spouse of the sponsor.
13. In making its decision, the Tribunal has carefully considered the documentary evidence on the Department's file, the substantial amount of additional documentary evidence that has been submitted to the Tribunal and the oral evidence provided by Ms Pham and Mr Tran. The Tribunal notes that the parties gave highly consistent oral evidence; their answers did not appear rehearsed, but rather spontaneous and natural. The Tribunal finds both parties to be credible.

Whether the parties are in a spouse or de facto relationship

14. Clauses 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the de facto partner of the review applicant who is an Australian citizen.

Are the parties in a de facto relationship?

15. 'De facto partner' is defined in s.5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
16. In forming an opinion about whether they are in a de facto relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

17. Financial aspects

18. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses and any combined future financial commitments or plans.
19. The Tribunal questioned the couple about their financial arrangements. Both Ms Pham and Mr Tran gave detailed and highly consistent oral evidence about each other's employment histories and financial affairs. The Tribunal accepts that Ms Pham is a registered nurse and works in a large named Melbourne hospital. The Tribunal accepts that Mr Tran works for a named digital design company as an art production manager. Based on the evidence before it, the Tribunal accepts that the parties previously operated a joint bank account with the Bank of Melbourne when Mr Tran was living in Australia.

20. The Tribunal acknowledges there is a degree of difficulty in establishing and sharing financial resources when the parties live in separate countries. Accordingly, their physical separation means that, as at the time of this decision, they will have had limited opportunities to pool their financial resources and share their day-to-day household expenses.
21. There is no other evidence before the Tribunal of any joint liabilities, jointly owned assets and/or legal obligations owed by the parties in respect of each other.
22. The Tribunal places limited weight on the financial aspects of the relationship.

23. *Nature of the household*

24. The Tribunal has considered the nature of the household including any joint responsibility for the care and support of children, living arrangements of the parties and the sharing of the responsibility for housework.
25. The Tribunal notes that, at the time of this decision, no evidence has been provided to the Tribunal about any current sharing of the responsibility for housework. This is unsurprising given that the parties live in different countries and do not live together on a permanent basis.
26. The Tribunal notes and accepts that the parties previously lived together from 2014 to 2016 when Mr Tran departed Australia for Vietnam, including at properties in Maidstone, Richmond and Bundoora. The Tribunal notes that since Mr Tran moved back to Vietnam in March 2016, Ms Pham has spent approximately 12 weeks together in the company of Mr Tran during her various trips to Vietnam and/or on their holidays together. The Tribunal accepts these claims.
27. There is no evidence before the Tribunal that the couple have shared responsibility for the care and support of children. This is unsurprising because the couple do not claim to have any children together.
28. The Tribunal places limited weight on this aspect of the relationship.

29. *Social aspects*

30. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being de facto partners, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
31. The Tribunal is satisfied that the parties have represented themselves socially to their family and friends as a couple and continue to do so at the time of this decision. The Tribunal has considered evidence relating to the social aspects of the relationship, including numerous printed photos viewed by the Tribunal of the couple travelling and socialising together in various settings, and the consistent oral evidence of the couple at the hearing. The Tribunal accepts that both families of the parties are aware of and support the relationship.
32. The Tribunal asked the couple about the joint social activities they undertake together. They gave independent and consistent oral evidence of various social aspects of their relationship, and details of numerous trips and holidays they have taken together. The Tribunal notes that both Mr Tran and Ms Pham were able to recall specific details of each other's extended family composition and circumstances. The Tribunal notes that there is documentary evidence, including photos, travel receipts and boarding passes, on the Tribunal's file corroborating some of these claims. The Tribunal accepts the couple's claims.

33. On the basis of the evidence, the Tribunal finds that the parties represent themselves to others as being in a genuine and continuing relationship, and that the couple plan and undertake joint social activities. The Tribunal finds that the relationship is viewed as genuine and continuing in the opinion of the couple's family members, friends and acquaintances.

34. In view of the evidence before it, the Tribunal places positive weight on the social aspects of the relationship.

35. *Nature of the persons' commitment to each other*

36. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length of time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.

37. The consistent evidence of the couple is that they have been in a relationship since late 2013, having first met that year when Mr Tran started working in a restaurant owned by Ms Pham's then husband. The Tribunal accepts that Ms Pham separated from her husband in mid-2013 and that her relationship with Mr Tran became more intimate from that point onward. Mr Tran proposed marriage to Ms Pham in February 2014 after she returned from a trip to Vietnam for her father's funeral. The Tribunal accepts that the parties moved in together in mid-2014 to a property in Maidstone and continued to live together, including at addresses in Richmond and Bundoora, until Mr Tran departed Australia in March 2016.

38. The Tribunal notes that Ms Pham's travel history back to Vietnam at regular intervals to visit Mr Tran since he departed Australia is consistent with her oral evidence that she was keen to cultivate and continue the relationship. The Tribunal has had regard to documentary evidence (including numerous travel receipts, boarding passes in both parties' names and various photos from each location) of extensive international travel the couple have undertaken together, including to Thailand and Vietnam in January/February 2017; to Vietnam, Singapore, Malaysia, Indonesia and Thailand in August 2017; to Vietnam and South Korea in November 2017; to Vietnam and Thailand in August 2018; and to Vietnam, Thailand and Taiwan in March/April 2019. The Tribunal accepts these claims. The couple's consistent evidence, which is supported by some documentary evidence (such as phone records), is that the couple spoke almost daily when Ms Pham was in Australia and they continue to do so up to the time of the hearing.

39. The Tribunal notes the largely consistent evidence of the parties regarding specific elements of their relationship history and the timeline of significant events. The Tribunal notes that the couple gave generally consistent oral evidence about plans they had made for their future in Australia, in the event that the visa application was successful. This included specific work opportunities Mr Tran may pursue in Melbourne and plans for their wedding in Australia. The Tribunal is satisfied that the couple have had substantive discussions about their future together in Australia and have made credible plans in anticipation of a visa being granted.

40. The couple's evidence about the nature of the relationship and their personal circumstances was detailed and consistent. The Tribunal questioned both parties about their familiarity with each other and is satisfied that they both demonstrated knowledge of each other's lives suggestive of a couple in a genuine and continuing relationship.

41. *Conclusion on s.5CB(2) requirements*

42. After having regard to all of the available evidence, including matters relating to r.1.09A(3) of the Regulations, the Tribunal is satisfied that at both the time of application and the time of decision the couple had and have a mutual commitment to a shared life to the exclusion of

all others, were and are in a genuine and continuing relationship, lived and live together and not separately and apart on a permanent basis, and are not related by family. For these reasons the Tribunal is satisfied that the applicant and sponsor meet the requirements of a de facto relationship within the meaning of s.5CB(2)(a)–(d).

43. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at both the time the visa application was made and at the time of this decision.

Are the additional criteria for a de facto relationship met?

44. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the Tribunal is satisfied on the evidence before it that Mr Tran and Ms Pham were at least 18 years old.
45. The applicant must have been in the de facto relationship for at least the 12-month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
46. The Tribunal accepts that Mr Tran and Ms Pham first met in May 2013. The Tribunal is satisfied based on the written and oral evidence before it that Mr Tran and Ms Pham started a committed relationship in February 2014 and began cohabiting shortly thereafter. Accordingly, the Tribunal is satisfied that the applicant had been in the de facto relationship for at least the 12-month period ending immediately before the date of the application (15 March 2016).
47. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.

Conclusion

48. Given these findings the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a de facto relationship. Therefore Mr Tran meets cl.309.211(2) and cl.309.221.
49. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

50. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211(2) of Schedule 2 to the Regulations;
 - cl.309.221 of Schedule 2 to the Regulations;
 - r.2.03A.

Scott Clarey
Member

ATTACHMENT – Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;
- the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).